Generally Speaking

Department of Law Monthly Report
July, 2008

COMINGS and GOINGS

Please Welcome

AAG Christopher Beltzer, Anchorage Tort and Worker's Compensation Section. AAG Beltzer will be handling workers' compensation cases.

Deborah Rupert, Case Manager/Administrative Clerk II, and **Loretta Lande, Supply/Library Clerk,** Anchorage Legal Support Services Section.

As of July 1 **Regan Williams** transferred from the Anchorage Office of Special Prosecutions and Appeals to the Anchorage DAO; he is now an ADA working in the Violent Crimes Unit.

AAG Peter Putzier transferred to the Anchorage Opinions, Appeals and Ethics Section from the Juneau Transportation Section. AAG Putzier will be one of the attorneys handling Indian law matters.

The Juneau Labor and State Affairs Section welcomed **AAG Anne Johnson**, who returned to the section to work with the retirement and benefits team. Section Chief Jan DeYoung says it is great to have AAG Johnson in the section again.

The Kenai DAO bid a sad farewell at the end of the month to **DA June Stein,** who transferred to a state-wide position with the Rural Prosecutions Unit in the Anchorage Office of Special Prosecutions and Appeals. She will be greatly missed by her co-workers. Former Bethel DA **Lance Joanis** will fill the **DA** position in Kenai.

IN THIS ISSUE

KUDOS

Congratulations to **Cora Hart**, promoted to the **Administrative Assistant I** position in the Anchorage Legal Support Services Section.

CIVIL DIVISION

Child Protection

New CINA cases based upon allegations in the Office of Children's Services (OCS) petitions:

OCS responded to a report of harm that a three-year-old girl had been sexually abused. The child had been living with various strangers her mother met in public places. When OCS intervened, the mother agreed that OCS should

take custody of her daughter as she was unable to care for her. OCS assumed emergency custody. The identity of the father is unknown.

OCS assumed emergency custody of an infant born to a mother with three other children in state custody. OCS had been working with the mother for approximately two years to help her address her drug problem, but those efforts were unsuccessful. The father's whereabouts are unknown.

APD responded to a report of an unconscious adolescent who had overdosed on heroin at a boarding home. The adolescent's seven-month-old baby was found to be suffering from infected eyes and general medical neglect. OCS assumed emergency custody; the identity of the father is unknown.

A guardian, appointed by the court to care for two children who had been abused or neglected, petitioned the court to have the children return to state custody. It was reported that the guardian no longer wished to care for the children and may have recently developed a problem with drugs and alcohol. OCS worked with the family in attempts to avoid disruption, but those attempts were unsuccessful. The biological parents were not available to care for the children due to their own substance abuse problems, so the state resumed custody.

OCS assumed emergency custody of a toddler when she was found playing outside unsupervised without appropriate clothing and in obvious need of medical attention. Upon investigation, the home was found to be filthy, smelling of alcohol and feces, and to have knives and bottles within easy reach of the toddler. The mother may have mental health concerns and the whereabouts of the father are unknown.

OCS assumed emergency custody of an infant born at 27 weeks gestation. The baby tested positive for cocaine and was in the neo-natal intensive care unit experiencing symptoms of withdrawal. The mother tested positive for a number of substances. Subsequently, the mother was arrested for armed robbery and incarcerated. The identity of the father is unknown at this time.

OCS received a report that four children had substantial bruising on their ears and necks, inflicted by an adult. The mother defended the alleged perpetrator. The father lives in another town, has a long history of domestic violence, and cannot safely parent at this time. The children were placed in foster care while the Anchorage Police Department investigates the abuse.

Numerous other children across the state were taken into custody as a result of serious risk of harm due to their parents' substance abuse, domestic violence and/or incarceration.

Commercial and Fair Business

State Settles Claims With Dey, Inc. for $1.5 Million

The state reached an agreement with Dey, Inc. to settle claims made by the state in a lawsuit filed by the state against Dey and 40 other pharmaceutical companies in October, 2006. The complaint alleges the defendants reported inflated average wholesale prices (AWP), which providers rely on when determining appropriate reimbursement rates for payers, like insurers and Medicaid agencies. Relying on these inflated prices, the state paid pharmacies and other providers more than what the providers actually bought the drugs for.

The state alleged in its complaint that defendants encouraged providers to prescribe its particular drug over a competitor's drug based on the "spread" between the inflated AWP and the actual cost of the drug, letting the providers pocket the difference. Dey manufacturers a variety of drugs sold in Alaska. The settlement will return to Alaska 150 percent of the state's actual damages. The state continues to litigate the case with the remaining defendants, and has hired outside

counsel to litigate these claims. Ed Sniffen is the lead AAG on the case.

State Brings Action Against Two Southeast Jewelers

The Consumer Protection Unit filed two lawsuits against jewelry businesses in Juneau for violations of the Consumer Protection Act and Retail Advertising Regulations. The stores, which operate seasonally, displayed signs such as *"Everything 70% Off"* or *"Blow Out Diamond Sale"* starting on the day that they opened for the season and continuing into July. Claiming that merchandise has been reduced by 70 percent is illegal comparison pricing when it is based on a fictitious "regular" price, such as occurs when the merchandise is always on sale. Similarly, it is illegal to advertise a "blow out" sale when there is no materially significant reduction from the regular price. Even after receiving letters from the department warning them that the signs were illegal, the stores continued to post the signs. AAG Cynthia Drinkwater is representing the state in this matter.

Superior Court Affirms State Medical Board's Adoption Of Settlement Agreement With Physician

On July 3, Superior Court Judge Sharon Gleason affirmed the State Medical Board's adoption of a 2005 memorandum of agreement (MOA) wherein New Mexico physician Ann-Marie Yost was issued a license to practice medicine in Alaska, but was also fined $1000 and reprimanded for failing to disclose on her application that she had previously been investigated in Washington. In 2007, Dr. Yost filed a breach of contract claim against the Division of Corporations, Business and Professional Licensing (Division), alleging that a division investigator promised her that she would be able to make a presentation to the board prior to its consideration of the MOA. Dr. Yost sought to have the MOA declared "null and void" and to have the board's report of discipline to the National Practitioner Data Bank "withdrawn". Earlier this year, the court granted in part the division's motion for summary judgment and determined that the breach of contract claim would be treated as an administrative appeal of the board's adoption of the MOA. Briefing and oral argument on Yost claims followed.

In her decision, Judge Gleason rejected Dr. Yost's argument that she and the division had negotiated an oral condition precedent allowing her to go to the board meeting and ask the board not to discipline her. Relying on *Jarvis v. Ensminger*, 134 P3d 353 (Alaska 2006), the court found that the plain, unambiguous language of the MOA did not include a condition precedent, nor did one arise by clear implication. The evidence indicated only that the division would have allowed Dr. Yost and her attorney to be present at the board meeting – not that their presence was required before the MOA could be approved. The court also found that the content of the board's report to the National Practitioner Data Bank did not constitute an abuse of the board's discretion and was adequately supported by the terms of the MOA. AAG Robert Auth represented the division throughout this proceeding.

Regulatory Commission of Alaska Upheld On "Retroactive Ratemaking" Challenge

On July 21, Kodiak Superior Court Judge Joel Bolger issued a decision affirming an order of the Regulatory Commission of Alaska (RCA or commission) that approved new depreciation rates for Chugach Electric Association (Chugach) to become effective retroactively as of January 1, 2005. Matanuska Electric Association (MEA), which is a customer and member-owner of Chugach, had appealed the RCA's decision arguing that the new depreciation rates could lawfully become effective only prospectively.

MEA's appeal arose out of a proceeding before the RCA commenced by Chugach in November 2004 to revise its depreciation rates. The commission is empowered by statute to determine "proper and adequate rates of depreciation" for

each class of property owned by public utilities. Depreciation is one of a utility's operating expenses that must be estimated accurately when setting utility rates and that accounts for the loss in service value of property, not restored by current maintenance. Chugach, however, did not propose to increase or adjust any of the rates it charges for wholesale or retail electric utility service. MEA intervened in the proceeding to protect its financial interest in Chugach's revenue stream as a member-owner in Chugach and a purchaser of wholesale power from Chugach.

Following extensive discovery and a lengthy administrative evidentiary proceeding, in January 2006, the commission approved new depreciation rates for Chugach. The commission ordered that Chugach's new depreciation rates would become effective retroactively to January 1, 2005. MEA asked the commission to reconsider the retroactive implementation of Chugach's new depreciation rates, arguing that the new depreciation rates could lawfully become effective only prospectively. The commission denied MEA's petition for reconsideration, and MEA appealed.

On appeal, MEA argued that the commission's retroactive implementation of new depreciation rates for Chugach was prohibited retroactive ratemaking. It is well-settled law in Alaska that the commission may not engage in "retroactive rate-making." A classical example of the kind of retroactive ratemaking that is not permitted would be allowing a utility to impose on rate-payers a surcharge to recover lost revenues attributable to an earlier accounting period. However, as argued by the commission and Chugach on appeal, a change in depreciation rates, by itself, does not result in any increase or decrease in the rates charged by a utility for the service or commodity it provides to the public. Accordingly, the commission's approval of new depreciation rates retroactive to January 1, 2005 did not constitute retroactive ratemaking. Judge Bolger agreed. He held that the rule against retroactive rate-making applies to utility rates, not to accounting entries like depreciation.

MEA also contended on appeal that the commission had deprived it of due process by imposing a limit on some of its discovery initiatives, in particular, limiting MEA to 20 requests for production of documents. On this issue, Judge Bolger held that MEA had received a fair opportunity to request any relevant discovery documents during the administrative proceeding. Senior AAG Robert E. Stoller represented the commission in this matter.

Environmental

Native Village of Point Hope et al. v. MMS et al. The 9th Circuit Court of Appeals denied plaintiffs' emergency motion for an injunction to stop BP and Shell from conducting seismic surveys in the Chukchi and Beaufort Seas this summer as authorized by the federal government.

Earthjustice, on behalf of various environmental groups and two Native Villages, filed suit in federal district court to prevent the studies. Shortly after filing its complaint, Earthjustice moved for a preliminary injunction. The State of Alaska moved to intervene to support the federal government's decisions allowing the surveys. The District Court granted the state's motion and denied Earthjustice's preliminary injunction motion. Earthjustice filed an emergency appeal with the 9th Circuit, which was also rejected. Oil, Gas and Mining Section AAG Jonathan Katchen. Environmental Section AAG Jennifer Schorr, and Statewide Section Supervisor Steve Mulder, represented the state.

Rat Island Pesticide Project

The Department of Environmental Conservation (DEC) approved a request for a permit from the United States Fish and Wildlife Service to aerially broadcast pesticide pellets to the entire land area of Rat Island in the Aleutian Islands and adjacent vegetated islets, an area of approximately 6,800 acres. Norway Rats are established on at least 10 independent Aleutian Islands. The Aleutians provide breeding habitat for 26 species of

seabirds including species and subspecies for which the Aleutians provide a substantial portion of their worldwide range. The diversity and numbers of breeding seabirds are conspicuously low on islands such as Rat Island with an established population of introduced rats. The goal of the project is rat eradication with the anticipated result of increased breeding habitat for seabirds on the island.

Human Services

Litigation Update

In the Matter Of South Anchorage Ambulatory Surgery Center. The superior court ruled against the Department of Health and Social Services in an appeal of an administrative decision denying an application by a joint venture to open a surgery center in South Anchorage. The court ordered the department to issue a Certificate of Need to the South Anchorage Surgery Center.

Licensing

AAG Rebecca Polizzotto referred four licensing matters to the Office of Administrative Hearings last month, one of which is being pursued on an expedited basis. AAG Libby Bakalar will second chair that hearing.

Medicaid

The Centers for Medicaid and Medicare Services (CMS) conducted an audit of the Department of Health and Social Services estate recovery processes. The section was asked to prepare material and participate in file reviews. AAG Erin Pohland prepared the documents that were submitted to CMS, while AAG Tim Twomey met with the auditors and answered questions related to the Department of Law's role. By all accounts, the audit was successful.
AAG Kimberly Allen received a favorable decision after a contested hearing and briefing related to Medicaid eligibility.

Other

Section Chief Stacie Kraly worked closely during the month with the Department of Health and Social Services and the Governor's office on issues related to the Governor's resource rebate proposal and other energy relief legislation that has been proposed.

AAG Libby Bakalar presented at four public assistance training programs on the importance of due process compliant notices.

AAG Kelly Henriksen attended a four-day seminar in Phoenix on HIPAA (Health Information Portability and Accountability Act). She has already had a number of queries on related matters.

AAGs Laura Derry and Erin Pohland have been out of the office studying for the bar exam.

Labor and State Affairs

Education

Moore v. State. On July 10 and 11, AAG Neil Slotnick and former Chief AAG Dean Guaneli participated in a mediation of this claim by NEA-Alaska, Citizens for the Educational Advancement of Alaska's Children (CEAAC, a nonprofit), and three rural school districts that Alaska's education system – and especially the funding of that system – is unconstitutionally inadequate. Although after a first trial (October 2006), Judge Gleason found education funding sufficient to satisfy the Constitution, she had concerns about state oversight of education in districts with a record of very poor educational performance and ordered a second trial on the issue of the state's oversight efforts. However, she interrupted the trial and ordered the parties into mediation. Because the claims were not resolved a continuation of the trial is expected later this year or in 2009.

Elections

Nick v. Bethel and Alaska. In this case challenging the adequacy of the Division of Elections' assistance to Yup'ik voters, Federal District Court Judge Burgess heard oral argument on the state defendants' motion for partial summary judgment. The motion asked the court to conclude that Alaska Native languages such as Yup'ik are historically unwritten as that phrase is used in the Voting Rights Act (VRA) and, because it is was unwritten, the VRA does not require the division to provide election materials in written Yup'ik. The plaintiffs maintain, in contrast, that Yup'ik is a historically written language. Judge Burgess granted the state's motion from the bench and, on July 23, issued a written decision concluding that Yup'ik is a historically unwritten language. The result is that under the VRA, the Division of Elections is required only to provide oral (but not written) language assistance related to voting. The judge cautioned his ruling did not mean the state was excused from producing any written materials under its obligation to provide effective oral assistance to Yup'ik voters. In fact, the division has prepared written documents in support of its oral language assistance, a Yup'ik/English glossary of election terms, and a written Yup'ik/English translation of ballot measures for bilingual poll workers to use in providing oral assistance to Yup'ik speaking voters. The plaintiffs' two motions for preliminary injunction remain undecided. These motions address the division's compliance with the oral language assistance requirements and with the pre-clearance requirements of the VRA. AAGs Sarah Felix and Margaret Paton-Walsh handled this motion.

Clean Water Litigation

Council of Alaska Producers v. Sean Parnell. On July 3, the Alaska Supreme Court issued an order affirming the superior court's affirmance of the Lieutenant Governor's decision to certify an initiative petition (07WTR3). The Court rejected all of the challenges to 07WTR3 (concerning interpretation, whether the measure constitutes an appropriation or special legislation, the ballot summary, and the statement of cost). An opinion will follow. AAG Mike Barnhill represents the Lieutenant Governor in these matters.

Croft v. Parnell. On June 26, Judge Rindner issued his decision in this appeal from the Lieutenant Governor's decision that an initiative petition, 07COGA, violated the single subject rule. He granted the Lieutenant Governor's motion for summary judgment and denied the plaintiffs' motion for summary judgment, concluding that combining a campaign finance program with an oil production tax in a single ballot measure (07COGA) was a substantial violation of the single subject rule. AAG Mike Barnhill represents the Lieutenant Governor in this case.

Employment

State of Alaska v. Equal Opportunity Commission. On July 3, Chief Judge Kosinkski of the 9th Circuit Court of Appeals announced that this case would be heard before the court en banc. At issue is whether the state has sovereign immunity from the federal Government Employee Rights Act. The state prevailed before the panel. The underlying dispute concerns claims of wrongful termination by two members of former Governor Hickel's staff. Argument is set for the week of September 22 in San Francisco. AAG Brenda Page is representing the state.

Parson v. Alaska Housing Finance Corp (AHFC). On July 25, the Alaska Supreme Court issued a decision in this wrongful termination claim against the state. The Court reversed the superior court's dismissal of the claim and remanded the case to that court for further proceedings on Parson's human rights claim against AHFC. Parson was a maintenance employee who was dismissed for refusing to participate in anger management counseling after a series of conflicts with co-workers and supervisors. He filed a discrimination complaint with the Alaska State Commission for Human Rights. The commission

investigated and concluded that substantial evidence did not support the claim. Parson then sued AHFC in superior court alleging violation of the covenant of good faith and fair dealing and discrimination. The superior court granted summary judgment on the contract claims and converted the discrimination claims into an administrative appeal of the commission's dismissal, after AHFC argued *res judicata* based on the commission's dismissal of the claim. Parson then voluntarily dismissed the administrative appeal and appealed to the Alaska Supreme Court. The central issue in the case is whether a dismissal by commission staff bars litigation of the same claim in state court. The Court held that the administrative action did not bar the wrongful termination claim and remanded the case for further proceedings on Parson's statutory claims of discrimination. Since the lawsuit was filed, the legislature amended the law to provide that the commission has "prosecutorial discretion" and a staff dismissal does not create a final judgment. This appeal was handled by former AAG Richard Postma.

Local Boundary Commission

Mullins v. Local Boundary Commission. Margret Mullins, pro se, challenged a decision of the Local Boundary Commission (LBC) approving the new Deltana Borough petition, which was then presented to the voters for approval. The vote was over 90 percent against the formation of a new borough. Mullins had tried to prevent the election earlier by filing a motion in superior court seeking a stay of the election which was denied. When the election failed, the state filed a motion to dismiss the superior court case under the mootness doctrine. The state's motion was granted and Mullins has now appealed to the Alaska Supreme Court. Mullins filed her opening brief on July 21. The LBC is represented by AAG Margie Vandor.

Local Property Taxes

Coonrud v. State of Alaska. On July 3, Judge Spaan granted summary judgment to the state, declining to find that AS 29.45.030, which exempts from taxes the residence of an educator in a private religious or parochial school, was unconstitutional under the Establishment Clause of the First Amendment. The decision was limited to the plaintiffs' facial challenge to the statute. The judge commented that, if the benefits of the exemption for educator housing were denied to secular, nonprofit educational groups, the statute might violate the First Amendment as applied. AAG Krista Stearns and former AAG Richard Postma handled this matter for the state.

Motor Vehicles

Morris v. Department of Motor Vehicles. On July 3, the Alaska Supreme Court upheld the Division of Motor Vehicle's revocation of Rick Morris's driver's license after he was arrested for DUI in June 2004. Morris provided a breath sample that tested at 0.089%, but requested an independent blood test that tested at 0.07%. His blood was taken only 37 minutes after the breath test. He argued at the administrative hearing and on appeal, that the blood test proved the breath test was unreliable and, therefore, his license should not be revoked. The hearing officer found that he likely had a high alcohol elimination rate and even assuming an elimination rate at the low end of the typical range, he would still have been over the legal limit at the time he was driving.

The Court's opinion notes the blood and breath tests could be harmonized on the basis that Morris had a high alcohol elimination rate and he had presented no other evidence to question the validity of the breath test. It held this was substantial evidence to support the hearing officer's conclusion. However, the Court also went on to reject Morris's implicit contention that if a blood test and a breath test are inconsistent the breath test must be wrong because blood testing is a superior method of testing.

The Court observed that changes to the law in 1980 expanded the definition of DUI to include not only driving with a *blood* alcohol concentration above a certain level but also driving with a *breath* alcohol concentration above a comparable level. The Court then reasons that, applying the average rate of alcohol elimination, Morris's blood test supports the hearing officer's finding that he was above the legal limit at the time he took the breath test (rather than at the time of driving). AAG Margaret Paton-Walsh represented the division.

Public Interest Attorneys' Fees

Petitioners for the Dissolution of the City of Skagway and Incorporation of the Skagway Borough v. Local Boundary Commission. This month the Alaska Supreme Court issued its decision in this case. The Court upheld the superior court's ruling that petitioners did not qualify as public interest litigants and therefore were not entitled to full attorneys' fees. For background, in 2001 "Petitioners for the Dissolution of the City of Skagway and the Incorporation of a Skagway Borough" (Petitioners) filed a petition with the Local Boundary Commission to dissolve the City of Skagway and form the Borough of Skagway. The commission denied the petition. Petitioners appealed the denial to the superior court alleging constitutional and statutory violations. The court ruled in favor of petitioners and remanded the matter back to the commission (and a reconstituted commission later approved the petition, leading to the formation of the Skagway Borough). The court awarded petitioners' partial attorneys' fees, rejecting their argument they were public interest litigants based on evidence showing that the City of Skagway controlled the petition and the ensuing appeal. Under the heading "The Public Interest Litigant Exception to Rule 82 Does Not Apply to Government-Initiated Litigation," the Court reasoned: "Petitioners are essentially acting as private attorneys general on behalf of the city's interests and the broader public interest that is consistent with the city's interests. The city would be precluded from claiming public interest litigant status here, and it follows that this bar should apply to parties litigating in its stead."

This case preceded and therefore did not address the statutory changes to public interest litigant fees in AS 09.60.010 adopted in 2003. AAG Mike Mitchell handled this matter for the commission.

Retirement and Benefits

After an appeal from a determination that certain municipal employees were not peace officers entitled to service credit toward the special public safety retirement benefits plan, the Office of Administrative Hearings issued a final order crediting certain municipal employees with that service because of the employees' responsibilities. These responsibilities included enforcing certain misdemeanors, coordinating with the police, training in law enforcement technique and crime prevention and detection, and exposure to the risks of law enforcement, and were found to weigh in favor of credit in the peace officer retirement system. AAG Kathleen Strasbaugh handled this matter for the Division of Retirement and Benefits.

Workers' Compensation

Veco v. State. This case concerns the Second Injury Fund which reimburses employers for some part of workers' compensation benefits paid to employees who were hired with preexisting medical conditions if the employer can satisfy certain requirements. At issue was the written record requirement in AS 23.30.205(c). Under AS 23.30.205(c), VECO, as the employer, needed to establish "by written records that the employer had knowledge of the permanent physical impairment before the subsequent injury …." Then it needed to prove that the preexisting permanent condition combined with the subsequent work injury to make the employee more disabled than he would have been without the preexisting condition. Alaska Statute 23.20.205(d) lists the qualifying pre-existing permanent conditions,

including arthritis. Here, Veco had contended that it knew of the employee's preexisting arthritis before the work injury (a back injury) occurred and that this arthritis combined with the new injury to make the employee more disabled than he would have been with only the new work injury. However, the employer's written record (a health questionnaire that the employee completed) did not show arthritis as a pre-existing condition. It only memorialized a back surgery involving "compression" and "five lower vertebrae." Because the records did not show that the employer was on notice that the employee had a listed condition, under prior judicial decisions, the employer would have failed to satisfy AS 23.20.205(d), as the Workers' Compensation Board had ruled. Nevertheless, in an apparent departure from precedent, the Court reversed the board and ruled that the board's interpretation of the Court's cases was too restrictive, suggesting that a written record showing a preexisting permanent back condition was sufficient to establish the listed condition arthritis. The Court remanded the case to the board to make the determination. By rejecting a bright line test, the case increases the difficulty of determining when an employer meets the written records requirement to qualify for Second Injury Fund benefits. Former AAG Richard Postma handled this appeal.

Mario Velderrain v. Division of Workers' Compensation. This month the Alaska Workers' Compensation Appeals Commission (AWCAC) issued its decision in this appeal by an uninsured employer who continued to operate without insurance in violation of a stop work order. The Alaska Workers' Compensation Board had imposed the mandatory statutory penalty of $1000 per uninsured employee workday for a total of $255,000. The employer appealed, arguing that the fine was so excessive as to constitute cruel and unusual punishment. The AWCAC upheld the imposition of a $1000 per uninsured employee workday fine, but questioned the board's finding that the employer was in violation for 255 days because the employer appeared to be closed for business on some of those days. The AWCAC remanded the case to the board to make further findings of fact and to recalculate the amount of the penalty. AAG Rachel Witty handled this matter for the Division of Workers' Compensation.

Legislation and Regulations

During July the section spent a busy month providing legal assistance for the fourth special session which began July 9.

The section also edited and legally approved for filing the following regulations projects: 1. Board of Game (predation control implementation plans and areas for Unit 16 and Upper Yukon Tanana River Predation Control Areas); 2. Board of Fisheries (Southeast Alaska King Salmon management plan; commercial salmon for Cook Inlet for driftnet fishery; prohibited commercial fishing gear in essential fish habitat areas; statewide King Tanner Crab in Bristol Bay area for lawful commercial King Crab gear; and Kenai River Drainage Area guiding and guided sport fishery requirements); 3. Department of Fish and Game (crewmember licenses; reports required; and use of salmon; special area violations and technical edits); 4. Board of Psychologist and Psychological Associate Examiners (licensure, temporary license, and criteria for master's degree); 5. Department of Commerce, Community, and Economic Development (capstone avionics loan program; fisheries enhancement tax appropriations); 6. State Board of Education and Early Development (repeal alternative performance standards for students with cognitive disabilities; teacher certification and continuation teacher preparation program; correspondence study programs); 7. Department of Environmental Conservation (update of financial responsibility regulations for oil and other hazardous substances pollution control); 8. Department of Natural Resources (state land use and permits for limited commercial harvest of non-timber forest products).

Additionally, the section gave legal advice on some emergency regulations projects and is preparing for its annual regulations training class. In mid-July, Section Supervisor Deborah Behr attended the annual meeting of the National Conference of Commissioners on Uniform Laws in Montana.

Natural Resources

University Land Conveyances

The Southeast Alaska Conservation Coalition (SEACC) and Tongass Conservation Society (TCS) have challenged legislation that conveys approximately 260,000 acres of state land to the University of Alaska's endowment trust. SEACC and TCS assert that the land grant violates the dedicated funds clause of the Alaska Constitution, which prohibits dedication of the proceeds of any state tax or license to a particular purpose. The state and university prevailed on cross-motions for summary judgment in the superior court. Plaintiffs appealed to the Alaska Supreme Court and, repeating a move that had been unsuccessful in the trial court, requested emergency injunctive relief. This time, the motion was granted by a single justice. The state filed an opposition to Plaintiffs' emergency injunction motion, as well as a motion to vacate the injunction order. The university also filed a limited motion for the full Court to reconsider the injunction order, asking that the full Court vacate the part of the injunction order that prohibits the state from continuing to convey land to the university, but maintaining the part of the order that prohibits the university from encumbering any of the conveyed land. The Court granted the university's motion and set an expedited schedule for briefing on the merits. AAG Anne Nelson represents the state in this case.

Parks Highway Fire

AAG Anne Nelson completed briefing a motion for summary judgment asking that the court distribute the interpled insurance proceeds on a pro rata basis in accordance with each party's proven damages. In this case, the state sued the party on whose property the 2006 Parks Highway Fire started to recover its suppression costs. That person then filed an interpleader action in which he placed the policy limits of his homeowner's liability coverage on deposit with the court and named as defendants the state, several private property owners who were burned out, and Toghotthele Corporation, who suffered commercial timber damages and possibly other compensable damages to its burned land. The state prevailed at summary judgment on the issue of whether the state's suppression costs were properly payable from the insurance proceeds. The state then filed another summary judgment motion asking the court to rule that the insurance proceeds would be distributed among the parties on a pro rata basis in accordance with each party's proven damages. Oral argument on the motion is set for September 2.

Land into Trust in State of Alaska

In November 2007, the state filed a motion to intervene in *Akiachak et al. v. United States*, pending in U.S. District Court for the District of Columbia. Plaintiff tribes and one individual challenge the regulatory bar prohibiting the Secretary of Interior from taking land into trust for the benefit of Native tribes and individuals in the State of Alaska. The regulatory challenge implicates state sovereignty issues as well as issues related to the scope and finality of the Alaska Native ANCSA land claims settlement. The court still has not ruled on the state's request to intervene, but the state has nevertheless attempted to participate in summary judgment proceedings by filing motions for leave to file an opposition to plaintiffs' motion for summary judgment as well as its own cross-motion for summary judgment, and lodging supporting memoranda with the court. The state filed a motion for leave to file and its reply memorandum on July 25. AAG Anne Nelson and Natural Resources Section Chief Elizabeth Barry represent the state.

Norval H. Nelson, Sr. v. State, Commercial Fisheries Entry Commission **and** ***Norval E. Nelson, Jr. v. State, Commercial Fisheries Entry Commission.*** On July 3, the Natural Resources Section received a joint opinion from the Alaska Supreme Court affirming the Commercial Fisheries Entry Commission (CFEC) in two related limited entry permit appeals. In *Norval H. Nelson, Sr. v. State, CFEC* and *Norval E. Nelson, Jr. v. State, CFEC*, the Court ruled (1) the CFEC was not estopped from denying the applicants additional "skipper" points because the Nelsons (father and son) failed to proved they relied on "mis-advice" from CFEC staff; and (2) the Nelsons failed to qualify for "extraordinary circumstances" points under 20 AAC 05.703(d), because their failure to participate sufficiently in the Northern Southeast Inside black cod fishery was due to the inadequacy of their gear rather than an unforeseeable mechanical breakdown. AAG John Baker represented the CFEC in these cases.

Appeal of the State of Alaska (Russian Mission). AAG John Baker reached a final settlement in an administrative appeal challenging the Bureau of Land Management's (BLM) procedures for determining whether land features within navigable water bodies should be considered emerged islands rather than gravel bars. In *Appeal of the State of Alaska (Russian Mission)*, the state had appealed to the Interior Board of Land Appeals (IBLA) from a BLM decision that purported to convey certain land features within the Lower Yukon River to the Russian Mission Native Corporation as part of the corporation's ANCSA entitlement. Under a memorandum of agreement (MOA) allowing dismissal of the appeal, the parties agreed to procedures to determine when an island has emerged from the bed of a water body after the date of Alaska statehood and is, therefore, owned by the state under the Equal Footing Doctrine. The MOA sets out criteria for emerged island determinations, as well as an administrative appeal procedure designed to streamline BLM conveyances to ANCSA corporations and reduce the number of IBLA appeals on this issue in the future.

Wilber v. State. In an opinion issued on June 27, 2008, the Alaska Supreme Court upheld the Commercial Fisheries Entry Commission's (CFEC) decision to deny a limited entry permit to Glenn Wilber in the geoduck dive fishery. Mr. Wilber has been a long time participant in the dive fishery for Southeast geoducks. However, participation points were only awarded for harvesting geoduck during 1992, 1993, 1994, 1995, and the first six months of 1996. During this period, Mr. Wilber only participated in 1995 and for a few days in 1996. He therefore came up short, lacking sufficient points to receive a permanent limited entry permit. He was issued a nontransferable permit that allows him to fish for his lifetime.

Mr. Wilber challenged the point system in this fishery. The CFEC regulation measures participation in years 1992, 1993, and 1994 based on pounds harvested in the calendar year. However, the legislature had established a moratorium effective July 1, 1996, and therefore it was not possible to treat 1996 as a full calendar year. In fact, the open season for geoducks in 1996 amounted to only a few days, and the catch was very small. The CFEC therefore determined it was reasonable to combine the harvest from 1996 with the totals from 1995, and weight this per period a little more heavily since it was the most recent. Mr. Wilber argued that CFEC exceeded its authority by creating a "year" that was longer than 365 days. He further argued that if the CFEC awarded him points separately for his catches in 1995 and 1996, as the law required, he would be entitled to a transferable limited entry permit.

The Alaska Supreme Court held that the CFEC was within the broad discretion granted it by the legislature when it defined the participation for 1995-1996 as other than a 365-day calendar year. Given the mid-year moratorium on the fishery imposed by the legislature, the Court held that the CFEC regulation was a reasonable

approach to determine which fisher persons would receive limited entry permits for geoducks. Justice Matthews entered a concurring opinion. He expressed concerns as to whether the state may measure past participation on an annual rather than a seasonal basis. This issue had not been raised in the appeal and he therefore concluded the issue was waived. The state was represented by AAG Tom Lenhart.

Caribou Hills Fire

The state entered into a settlement agreement with the person who, while sharpening tools, started the Caribou Hills Fire on the Kenai Penninsula last year. The fire burned dozens of cabins, homes, and other structures and expanded to over 55,000 acres before it was controlled. Under the settlement, the state received $250,000 plus the remainder of the $1.5 million insurance policy, if any, following payment of other claims and upon expiration of the statute of limitations in exchange for releasing the person who started the fire from further liability. Private parties damaged by the fire are currently pursuing their claims against the remainder. Senior AAG Kevin Saxby represented the state.

Oil, Gas, and Mining

The section continues to assist the administration on legislation to approve issuance of an Alaska Gasline Inducement Act License. The legislature was called into its 4th special session on July 9th. Section AAGs have attended and testified at legislative hearings on the approval bill and provided legal advice on a variety of issues.

Senior AAG Steve DeVries settled a corporate income tax dispute with a taxpayer producer for tax years 1999-2000. Under the settlement, the taxpayer agreed to pay the state $7.9 million, which consisted of $3.9 million for outstanding taxes and $4 million in back interest. The details of the dispute and settlement are confidential by statute.

Senior AAGs Steve DeVries and Richard Todd, working with the Department of Natural Resources, resolved its 2000–2004 royalty audit of BP Exploration for a gross payment of $48,000,000 after several years of work. This may be the largest payment ever received by the state to resolve a disputed royalty audit through negotiation. Other major cases have involved some type of litigation.

Earthjustice's unsuccessful efforts to get a federal court to stop seismic studies in the Beaufort and Chukchi Seas are noted in the Environmental Sections news. Attorneys from both that section and this one represent the state as an intervenor.

Opinions, Appeals and Ethics

The section reports AAG Judy Bockmon addressed a variety of informal ethics inquiries by email and phone. She has been working on one investigation and also has continued to review outside disclosures submitted to comply with the annual disclosure requirement (she received 93 disclosures from Department of Law employees). In addition, AAG Bockmon has been providing advice on outside employment disclosures to various ethics supervisors, analyzing possible amendments to the ethics regulations, and working on improving training materials.

Appeals

Shageluk IRA Council v. State of Alaska, Office of Children's Services. The state Office of Children's Services (OCS) has been served with an appeal from a trial court order denying a request by the Shageluk Village IRA Council to transfer a child in need of aid case to tribal court. Following unsuccessful efforts by OCS to reunify the Indian family, OCS filed a petition to terminate the parent's parental rights and free the child for adoption. At that point, the tribe, a silent participant throughout the case's tenure in state court, petitioned the superior court to transfer jurisdiction to tribal court. The Indian Child Welfare Act provides that upon such a request the state court must transfer jurisdiction

"in the absence of good cause to the contrary." The superior court denied the tribe's request, finding, in accordance with (nonbinding) Bureau of Indian Affairs guidelines to the statute, that the "proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing."

The tribe argued below that before the termination petition was filed it had no incentive to take jurisdiction because there was no direct threat to the parent-child relationship, and thus its interest in the child was not endangered, but that the filing of the termination petition placed the parent-child relationship (and thus the child's connection with the tribe) at jeopardy, triggering its motivation to take over the case. It argues that its petition to transfer the case was timely filed after it received notice of the termination petition, because the termination trial constitutes a new proceeding that was not yet at an advanced stage.

OCS's position is that by the time a child protection case reaches the termination phase, the case itself is at an advanced stage, in that the child will ordinarily have been in the state's custody for well more than a year, and OCS will have been providing family support services – that have proved unsuccessful – for at least that long. The case will have gone through several phases, with only the termination phase left to finally dispose of the case. In OCS's view, if a tribe wishes to step in and take over a child's case, it should do so early in the process rather than waiting until a termination petition is filed to step in (perhaps throwing the child back to square one as far as achieving permanency). The Alaska Supreme Court has not yet established a briefing schedule for this appeal. There is no Alaska case law on point.

Audrey H. v. State, Office of Children's Services. The Alaska Supreme Court released a decision in this case, (Docket No. S-12858; Opinion No. 6286 (Alaska, July 18, 2008), affirming an order terminating a mother's parental rights to her two daughters. The mother first argued that the trial court erred in concluding the girls were children in need of aid pursuant to AS 47.10.011(9) because the evidence demonstrated that the children were fed, clothed, and attended school. The Court rejected this argument, noting that the trial court had found that the greatest risk of harm to the girls was the risk of emotional harm created by the mother's inability to care for them or to take care of "normal day-to-day things." The Court also noted that there was evidence that the elder child was required to become a primary caregiver at any early age, that there were dangerous living conditions, that the children were exposed to drug and alcohol abuse and inappropriate sexual activity, and that the children had already exhibited "strong evidence of emotional damage," having been treated at North Star for mental health issues. In considering all of this evidence, the supreme court rejected the mother's assertion that the trial court "may not consider evidence probative of one subsection [of AS 47.10.011] in making a determination that a child is in need of aid under another subsection and explained that the trial court properly "considered the full range of evidence available to it" in making the finding that children had been neglected.

The mother also raised several arguments regarding the issue of whether the Office of Children's Services (OCS) made reasonable efforts to reunify the family and whether the trial court erred in excusing OCS from making further reasonable efforts prior to the termination trial. When the trial court excused OCS from making reasonable efforts pursuant to AS 47.10.086(b), it failed to comply with the statutory requirement that it make findings regarding the excusal at a permanency hearing. Instead, the trial court issued its findings in a written order. The Alaska Supreme Court concluded that this failure to comply with the statute was harmless since the day after issuing the written order, the trial court held a disposition hearing at which it also entered permanency findings and permitted the mother to object to such findings in order to preserve her right reopen the issue at a later date. But the

Supreme Court did note that the trial court should have "responded to the state's motion to discontinue reasonable efforts by holding a permanency hearing at which it could make the required findings that [the mother] had not sufficiently remedied her conduct or the conditions in the home despite reasonable efforts made by the department, and that discontinuing reasonable efforts was in [the children's] best interests." The Supreme Court then considered whether the trial court erred in concluding that OCS had made reasonable efforts (prior to excusing the department from making further efforts), and concluded that, looking at OCS's entire history with the family and the mother's occasional resistance to participating in services, sufficient efforts had been made.

Other Matters

A five-member team drawn from three separate sections of the Civil Division assisted the Governor's Office in responding to a public records request. Three attorneys, an associate attorney, and a paralegal made up the team. The request involved thousands of documents and raised many issues concerning the executive or deliberative process privilege. Because of the volume of documents and the issues they raised, the team's work required more than 150 hours. The party requesting the documents did not pay for that work, however, because current law does not permit the state to charge a requesting party for reviewing documents to determine whether any are privileged.

Regulatory Affairs and Public Advocacy (RAPA)

Rulemaking Comments Filed

R-08-03, telecom access charge reform. On May 20, 2008 the Regulatory Commission of Alaska (RCA) opened a rulemaking docket and issued an order seeking comment on potential modifications to the Alaska intrastate access charge system that would increase the consumer network access fee (NAF) to pay for long distance carrier (IXC) usage of the local telephone companies' (LECs) network for completing toll calls. The commission also sought comment on a proposal to subsidize the long distance carrier of last resort in certain areas of the Bush by increasing the consumer surcharge payment into the Alaska Universal Service Fund.

Three years ago in a predecessor rulemaking docket (R-01-1) the RCA established the NAF charge of $3 per month that is now paid by each *local* telephone subscriber to reduce the long distance carriers' access costs for providing in-state *toll* service. Historically, all intrastate access charges have been paid by IXCs to LECs for IXC use of the local network to provide toll calls. The current proceeding proposes to increase the NAF and establish additional fees for payment by all local end-users to further reduce the payments made by the IXCs. In R-01-01, the Attorney General/RAPA advocated unsuccessfully that the commission should require a mandatory pass-through to ratepayers of the NAF monies received by the IXCs by reducing long distance rates by the same amount. The IXCs maintained that market competition would 'voluntarily' flow-through the benefits to ratepayers and the commission decided to try that approach.

In comments filed on July 18 by staff telecom analyst Lew Craig, the Attorney General/RAPA reiterated much of its advocacy from R-01-1, including the desirability of a mandatory pass-through. RAPA also advocated that the commission should not increase the NAF absent a showing that since its introduction, toll rates have actually decreased, as promised by the IXCs. Further, RAPA advocated that the commission should not introduce an additional universal service surcharge to subsidize the IXC carrier of last resort absent evidence that there exists a cost-based need for such a subsidy. RAPA also recommended that if the RCA pursues the subject proposals, the proceeding should provide for consumer outreach, education, and input to the maximum degree possible.

Thus far, AT&T Alascom, GCI, and the Rural Coalition (of LECs) have also filed formal comments in the proceeding. A procedural schedule has not yet been established.

Adjudicatory Hearing

U-08-04, AWWU depreciation study. Anchorage Water and Wastewater (AWWU) filed a required depreciation study in January 2008, its first such filing since 1985. Depreciation expense is the largest single expense paid by a utility and it can have major impact on utility rates. Responsive to RCA request, the Attorney General/RAPA filed an election to participate in the case on February 8, 2008.

Subsequently, RAPA pre-filed the direct testimony of its contract expert witness, William Dunkel, which challenged AWWU's proposed methodology ("Equal Life Group") for determining depreciation rates and recommended the use of the Average Service Life procedure. The commission conducted an adjudicatory hearing on July1-2; witnesses for RAPA and the utility were cross-examined by counsel and by commissioners.

The matter is now under deliberation by the commission. If RAPA's position is ultimately adopted by the commission, the applicable depreciation amount would be reduced by approximately $1 million and the utility's revenue requirement would be adjusted downward accordingly at the time of its next rate case.

Torts and Workers' Compensation

The state filed its appellee's brief to the 9th Circuit in a case involving a § 1983 claim against a Department of Natural Resources (DNR) employee arising out of the state's termination of a construction contract for default. The contract involved reducing slope steepness at an abandoned mine. The contractor pursued an administrative claim for wrongful termination, and a state hearing officer ruled in favor of DNR. Both the superior court and the Alaska Supreme Court affirmed. Plaintiff, Psenak, then filed a § 1983 suit against a DNR employee, claiming Alley had altered a ground disk survey that the state used to calculate the progress of work under the contract; that as a result of the alteration and the state's reliance on the altered data the state failed to pay Psenak for actual worked performed; and that the alteration led to a violation of Psenak's due process rights because DNR used the altered data to defend the wrongful termination claim.

The state, represented by former AAG Dave Floreischinger, moved for summary judgment below on the grounds that (1) collateral estoppel applied and (2) Psenak's claims were not afforded due process protection under §1983 because state law provided an adequate remedy and sufficient due process. Judge Burgess granted the motion on the latter ground, finding that unlike cases involving a "present entitlement" (*i.e.* the right to exercise dominion over personal property or to pursue a gainful occupation), Psenak's §1983 suit derived from the same contract-based claims he had already pursued in state court and was therefore "no more than a contractual injury." Because Psenak's interest was a contractual dispute with a government agency, and because the contract claim had been thoroughly adjudicated, the court found that state law provided Psenak with adequate process and that his §1983 claim failed as a matter of law. Psenak appealed to the 9th Circuit. AAG Janell Hafner handled the appeal on behalf of the state, arguing that the district court's ruling could be upheld on either ground raised below or alternatively on the basis that Psenak failed to file his claim within the statute of limitations.

In a lawsuit filed by a *pro se* inmate, Judge Trevor Stevens granted the state's motion for summary judgment dismissing the last remaining claim brought by plaintiff against the prosecutor in his criminal case. The summary judgment motion argued that there is no evidence to support plaintiff's claim that the prosecutor conspired with or threatened the plaintiff's appellate criminal

defense attorney so that conspiracy allegations were not raised in his criminal appeal. It also argued that because he could not have raised the conspiracy allegations in his criminal appeal, he had no actionable claim for damages. Earlier in the case, all other claims raised by the plaintiff were dismissed. The case was defended by AAG Rebecca Cain.

CRIMINAL DIVISION

Anchorage DAO

The Anchorage offices conducted 10 trials and 54 grand juries during the month.

In a sentencing of note, ADA Brittany Dunlop attempted to conclude the sentencing of Yosbany Moore, a 24-year-old with five prior felony convictions. In 2007 Moore committed an attempted sexual assault one, which carries a presumptive range of 35-50 years in jail. After a guilty verdict at trial and before sentencing Moore, Judge Michael Wolverton expressed a "fundamental disagreement" with the presumptive sentence range. Noting that the three-judge panel is an underutilized vehicle for sentencing, the judge found the presumptive range "manifestly unjust" and made the referral. Anchorage has seen many more motions for this sentencing alternative in recent months.

In trials of note, ADA John Novak secured the conviction of John Carr for felony failure to appear. This doesn't sound that interesting until one considers that the failure to appear occurred in 1991, when Carr left the state during the middle of a felony assault trial. Carr was convicted in absentia and remained at large until 2006 when he applied for some social security benefits. For those who did not know that a "warrant in the system" precludes an applicant from receiving most forms of public assistance, this case serves as a good reminder of the reason to keep warrants active rather than dismissing them as stale.

ADA Ben Hofmeister won a five-week gang-rape case with three co-defendants. The two victims were admitted cocaine abusers who frequently traded sex for drugs and/or money. The highest charge convicted was a kidnapping charge involving one of the two victims who stole drugs from the male drug dealer, who then dispatched two female lieutenants to pick up the thief and then brutalize and humiliate her. Sentencing could put all three away for the rest of their lives.

ADA Rob Henderson traveled to Dutch Harbor to try two cases. The Okmok volcano erupted and stranded him for 10 days. The judge made it in and the DAO managed to get their witnesses out to the island, but the public defenders were unable to get on a flight until week two. Ultimately, ADA Henderson won the first trial, a felony forgery, and the second defendant pled. ADA Henderson really enjoyed his time off the road system, but decided he's not going to volunteer again soon.

ADA Taylor Winston won a kidnapping/rape case involving Nathawn Johnson. Mr. Johnson, who fancied himself a lady's man, made several statements to police and civilian witnesses, including some disparaging remarks about the victim of the crime. Forensic evidence prevented him from continuing to deny any contact with the victim. Because of his prior record, he faces 40-60 years on the sexual assault. Johnson was on probation in two prior felony cases.

Summer interns, Kelly Ard and Aisha Hill won misdemeanor trials, closing out a great summer for them and the DAO.

Fairbanks DAO

By and large July was a typically average month in Fairbanks. The offices presented 41 new cases to the grand jury including four sexual assaults and six felony driving under the influence cases.

ADA JB Brainerd traveled to Galena for a trial against a school teacher charged with assaulting one of her students. According to six other student witnesses, the experienced teacher, who had been teaching for 12 years, picked up one of her seventh grade students out of his seat, placed him face down on the floor, and then put her knee in his back and made him cry. She was charged with assault in the fourth degree. At the bench-trial the teacher claimed she had only be "horse-playing" with the student and thought her actions inconsequential. The trial judge found her not guilty of assault, but guilty of the lesser included disorderly conduct. This was a high profile case because it carried political and racial overtones which made it extremely sensitive in the local community. The victim's mother and other residents of the community specifically expressed their gratitude to ADA Brainerd for taking the time to go to Galena to prepare and take this case to trial, and their view that justice had been achieved by the result.

A 41-year-old Fairbanks man had been indicted for two counts of class B felony sexual abuse of a minor in the second degree following allegations that he fondled his 17-year-old step-daughter over her clothes. The case was particularly difficult because of the lack of any physical evidence (allegations of contact over clothing only). The defendant admitted to hugging his step-daughter because his wife was overseas at the time and he was lonely. In the weeks before trial the defendant had been offered, and had rejected, a plea to C felony attempted sexual abuse of a minor. While the jury was being selected, a defense investigator interviewed the victim and evidently found her to be as convincing as ADA Jenel Domke did. After the jury had been selected and sworn, but prior to the introduction of any evidence, the defendant asked if he could plead to the pretrial C felony offer. ADA Domke agreed that he could do so, open sentencing. The defendant then entered his plea, and a September trial date is pending. The conviction itself is a good result and ADA Domke is to be congratulated.

Summer intern Nick Cummings, a third year law student at Gonzaga University, is now batting a thousand in his trial statistic. Intern Cummings successfully prosecuted a Fairbanks man for assault in the fourth degree in a two-day trial against a seasoned public defender. Mr. Cummings was assisted by ADA Joe Dallaire. Congratulations to Intern Cummings.

Kenai DAO

Trials

There were three trials that were particularly noteworthy this month. In the one that made the Daily News and the radio, Seward ADA Gary Poorman won a conviction of a defendant who allowed his turkeys to roam at will. The headline noted, "Man convicted after his turkeys waddle off." The reason the turkeys came to the attention of law enforcement was because they wandered onto the elementary school yard where they were chased by a bear. Since children were in the area, parents were concerned for the children's safety and the troopers were alerted. The judge fined the defendant $500.

In another trial, domestic violence ADA Angela Jamieson went up against a *pro se* defendant. There were significant injuries in this case because once the defendant got the victim on the ground, he kicked her in the face with his unshod foot. Her face was bloody as was his one sock. His defense was that he didn't do this recklessly; he did it instinctively. He told the jury that he was taught to leave no enemy standing, and that's what he was doing here. The jury did not buy that argument and convicted on the assault as well as disorderly conduct for his interactions with the troopers when they arrived.

ADA Kelly Lawson secured the third significant conviction on a .083 felony DUI. Many defenses were offered, but the primary one was that with three blood results obtained from three different labs, none of them, including the Datamaster,

could be believed. The defense team, consisting of three public defenders, brought their lab expert up from outside to testify, but unfortunately for them, she said that they could all be believed and the lack of consistency in the results was to be expected. ADA Lawson is thinking of hiring her for our next blood DUI case. The jury convicted and then found him guilty of a felony following the bifurcation.

Grand Jury

The grand jury got to experience the joys of summer on the Peninsula, starting with July 4th in Seward. As a result, the offices had seven felony DUIs, seven felony drug cases, two eluding cases, three burglaries/thefts, two felony failures to register as a sex offender (one of which has now been dismissed because of *Doe*), and 11 assaults, including some motor vehicle crashes.

In one multiple-count burglary/theft, the defendant broke into a tire store and an adjacent auto sales lot and stole vehicles and tires. He was caught because one of the vehicles got a flat tire and he fled from the police. Inside the vehicle were the keys for numerous other vehicles from the auto lot. The defendant had stolen the keys in a burglary the week before at the same store.

In one of the drug cases, the defendant had a scam where he would call pharmacies during the night and leave a recording for a prescription for Hydrocodone, using a doctor's secret DEA pass code. He did this in numerous pharmacies on the Peninsula, obtaining over 600 pills in one month. When the doctor whose code was used was contacted at his Arizona office, he said that he had been getting calls from numerous states regarding the defendant obtaining these drugs.

In another drug case, the defendant had made a false bottom in a spray can. Inside he had individually wrapped bindles of cocaine.

In a Seward assault case, a 60-year-old couple was in bed when the husband woke up to an unknown sound. He saw a man with a large knife standing at the foot of the bed. He calmly got the man out of the bedroom and was able to throw the intruder off the second-floor landing. However, the stranger managed to land on his feet. The husband shouted that he would kill the burglar if he came back up the stairs. The burglar fled, later to be apprehended by the troopers.

Hearings

After four years of waiting, the family of a murder victim may finally get some justice. On August 7, 2004, the defendant in this case shot and killed Moshe Wilkinson in Homer with a 25-caliber bullet into his eye. On the morning of trial, October 23, 2005, with the jury waiting in the wings, the defendant entered into a plea agreement to murder in the second degree. A sentencing date was set for February 27, 2006. That sentencing never happened; since then, the defendant has filed a series of motions to withdraw his plea. This month the court denied the motion, declining to find that his counsel was ineffective. Sentencing is now set for September.

Kodiak DAO

Business in Kodiak remained steady during the month. The Kodiak grand jury began a new session with mostly theft and forgery related offenses presented.

A Kodiak woman was indicted for taking a friend's debit card and making an unauthorized withdrawal. A week later the same woman was indicted for forging checks on her mother's account.

A Kodiak man was indicted for theft in June and failure to appear at the felony omnibus hearing on the theft in July. When he was arrested on the warrants, he was in possession of crack cocaine and marijuana resulting in new felony charges.

In a separate incident, a Kodiak man was indicted for felony theft and interference with official proceedings. Court documents reflect the defendant called 911 to report a truck blocking him in at an apartment complex. The owner of the offending vehicle had gone to the local Wal-Mart to get a battery having inadvertently left his wallet containing cash and debit cards on the front seat. During the 10 minutes the owner was gone, the defendant went with his nephew to push the truck out of the way. The defendant denied knowledge of the wallet when police arrived but admitted his nephew had helped him move the truck. The defendant reportedly contacted his nephew after police indicated they would be speaking with the nephew. Unfortunately for the defendant, the nephew not only reported seeing the wallet with money sticking out of it, he also said the defendant threw the wallet in his own truck and said the uncle told him to tell the police that he didn't see any wallet and then told the nephew there would be work available for him soon.

Fuel costs in Kodiak have soared during the summer. Diesel fuel is selling for $5.44/gallon at the pumps with regular gas not far behind. Increased fuel costs have impacted the local fishing fleet in more than one way. Kodiak police personnel advise that reported thefts of fuel from vessels and vehicles have been increasing. It is anticipated that home heating fuel thefts will also increase during the coming months.

Kotzebue DAO

Arthur Nelson cut short his second degree sexual assault jury trial, entering a guilty plea to the charge and receiving fifteen years to serve. Nelson is a second sexual felony offender.

Nome DAO

Darla Longley received 18 years with eight suspended for manslaughter. In a car crash last summer, Longley killed Kavi Goldsberry and injured three other passengers, including two of her own daughters. Longley was driving at over 80 mph and with an alcohol level over twice the legal limit when she lost control on the gravel highway just outside of town.

Eli Dickson entered his guilty plea to manslaughter for kicking Rudy Pushruk to death in Teller last October. Dickson also admitted the "most serious" aggravator. Sentencing will be held this October.

Office of Special Prosecutions and Appeals (OSPA)

Rural Prosecution Unit

The month of July found the section reduced by one attorney. By mid-August it will be back up to staff. Despite that, the rural prosecutors traveled on three occasions to Bethel and twice to Kotzebue, to fill-in during staffing shortages. While traveling, the attorneys screened numerous cases in an effort to relieve some backlogs. They also appeared telephonically at numerous omnibus hearings as well as other court hearings for other offices.

The section took over two complicated murder cases and a multiple-victim sexual abuse case from the rural DA's offices.

Special Prosecution Unit

Leon Outwater Sr. was arrested on July 30 for manufacture of alcohol without license or permit in local option area, sale of alcohol without license or permit in local option area, furnishing alcohol to minor in local option area, and assault four in Noorvik, Alaska. Outwater was formerly the Village Police Officer of Noorvik. This is the first

case charged by OSPA that is subject to the new penalty provisions passed in Senate Bill 265. Outwater now faces a mandatory minimum fine of $10,000 if convicted on either of the first two felony counts and is not eligible for a suspended imposition of sentence under the new law.

SAVE THE DATE

October 1-3 – Civil Division Conference Anchorage

October 6-8 – Criminal Division DA/Paralegal Conference, Girdwood